

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of SBC Telecom, Inc.)	WC Docket No. 04-46
for Modification of a LATA)	
Boundary in Ohio)	

**COMMENTS OF THE
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential utility consumers of the State of Ohio,¹ submits comments regarding the above-referenced Petition filed by SBC Telecom, Inc. ("SBC Telecom" or "the Company") on February 13, 2004.² The Company seeks a modification of the Local Access and Transport Area ("LATA") boundary between the Dayton and Lebanon exchanges in Ohio. SBC Telecom asserts that the modification is necessary in order for the Company to be able to provide a local calling area to customers in Lebanon, Ohio that mirrors the local calling area of the incumbent local exchange carrier ("ILEC") for the Lebanon exchange, United Telephone Company of Ohio dba Sprint ("Sprint").³ According to the Company, the modification would allow SBC Telecom to compete more effectively with Sprint in the Lebanon exchange.⁴

¹ The OCC is authorized by Ohio law to represent the interests of Ohio's residential utility consumers before state and federal courts and agencies. See Ohio Rev. Code Ann. Chapter 4911 (Anderson 2001).

² By Public Notice (DA 04-603) dated March 3, 2004, the Wireline Competition Bureau established a pleading cycle on the Petition, setting March 17, 2004 for comments and March 24, 2004 for reply comments.

³ See Petition at 1.

⁴ See *id.* at 3-4.

The OCC agrees that the local calling area of a competitive local exchange carrier (“CLEC”) should not be smaller than that of the ILEC against whom the CLEC is competing. Thus, the OCC supports the Petition.

The Petition would allow SBC Telecom to fulfill a long-delayed commitment from the approval by the Public Utilities Commission of Ohio (“PUCO”) of the 1999 merger of the Company’s parent, SBC Communications, and Ameritech.⁵ If SBC Telecom seriously and meaningfully follows through on that commitment, residential customers in the Lebanon exchange may finally enjoy increased choice for local service.

The Lebanon exchange is a prime example of the unfulfilled promise of the Telecommunications Act of 1996 (“the Act”)⁶ for residential consumers. According to PUCO information,⁷ the Lebanon exchange is served by only three “operational” CLECs,⁸ all of which apparently serve only business customers in the Lebanon exchange. Four other CLECs – Level 3 Communications (“Level 3”), Data-Telecom Corp. (“Data-Telecom”) QualStar Communications, Inc. (“QualStar”) and EZ Phone⁹ – are listed as “Available,” which means they

⁵ *In the Matter of the Joint Application of SBC Communications, Inc., SBC Delaware, Inc., Ameritech Corporation and Ameritech Ohio for Consent and Approval of a Change of Control*, PUCO Case No. 98-1082-TP-AMT, Stipulation and Recommendation (February 23, 1999) at 22 (available at <http://dis.puc.state.oh.us/CMPDFs/B23EMOGBTBH1U+IB.pdf>). The PUCO approved the Stipulation and Recommendation by Opinion and Order dated April 8, 1999 (available at [http://dis.puc.state.oh.us/CMPDFs/EAS\\$BIUXQWSYF\\$62G.pdf](http://dis.puc.state.oh.us/CMPDFs/EAS$BIUXQWSYF$62G.pdf)).

⁶ Pub. L. No. 104-104, 110 Stat. 56.

⁷ The source for the following discussion is information obtained for the Lebanon exchange through the PUCO’s Competitive Local Telephone Company Finder (available at <http://www.puc.state.oh.us/apps/cleclookup/service.cfm?County=&Exchange=Lebanon&Company=&Submit=Submit>). Using this device, however, also yields results for the New Lebanon and South Lebanon exchanges. These exchanges are not the subject of this proceeding; thus, those results have been ignored.

⁸ Time Warner Telecom, Communications Options, Inc. and Cincinnati Bell Telephone. In the PUCO’s terminology, “operational” CLECs are those that actually have customers.

⁹ EZ Phone, a provider of prepaid local service, has a monthly basic local service rate that is more than double Sprint’s rates for the Lebanon exchange. Thus, because EZ Phone’s service would be attractive to only a very few customers, it cannot be considered a true competitor in the Lebanon exchange.

have a certificate authorizing them to provide local service but have yet to serve their first customer in the exchange. Although all four apparently plan to serve residential customers, none has done so in the Lebanon exchange, despite the fact that all four have been authorized to provide service in Ohio for at least 17 months:¹⁰ Level 3's application was approved in October 1998;¹¹ Data-Telecom's in April 2000;¹² QualStar's in August 2000;¹³ and EZ Phone's in November 2002.¹⁴ Thus, more than seven years after the Act went into effect, residential customers in the Lebanon exchange still have yet to see the first glimmer of competitive choice.

The Commission should act quickly on the Petition to avoid any more delay in the fulfillment of the merger commitments. Commission approval of the previous LATA modification request filed by SBC Telecom as a result of the merger case came more than two

¹⁰ This disparity points out a flaw in the Commission's delineation (or at least how the PUCO has interpreted the Commission's delineation) of "mass market" and "enterprise" customers in the *Triennial Review Order* ("TRO"). *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (August 21, 2003), ¶ 497. The PUCO's interpretation of the TRO makes no distinction between CLECs that serve small business and residential "mass market" customers and those that serve just small business customers. See *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in the Mass Market*, PUCO Case No. 03-2040-TP-COI, Opinion and Order (January 14, 2004) at 33-34 (available at [http://dis.puc.state.oh.us/CMPDFs/SIY7\\$JQHWDI6IL\\$W.pdf](http://dis.puc.state.oh.us/CMPDFs/SIY7$JQHWDI6IL$W.pdf)). Thus, as the PUCO has interpreted the "mass market" for purposes of the Commission's trigger analysis, the presence of three CLECs serving only small business "mass market" customers in a geographic market could choke off competition for residential customers in that geographic market. Although residential and small business "mass market" customers may share some common characteristics, CLECs often target small business customers without serving residential consumers. Future Commission TRO proceedings should recognize this distinction.

¹¹ See *In the Matter of the Application of Level 3 Communications, LLC for a Certificate of Public Convenience and Necessity to Provide Intrastate Local Exchange and Interexchange Telecommunications Services in the State of Ohio*, PUCO Case No. 98-1160, Entry (October 16, 1998) (available at <http://dis.puc.state.oh.us/CMPDFs/VUQBYP+@OF9QKR@F.pdf>).

¹² See *In the Matter of the Application of Data-Telecom Corp. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Service*, PUCO Case No. 99-149-TP-ACE, Finding and Order (April 4, 2000) (available at [http://dis.puc.state.oh.us/CMPDFs/DA5JH2\\$DJ32OARZ9.pdf](http://dis.puc.state.oh.us/CMPDFs/DA5JH2$DJ32OARZ9.pdf)).

¹³ See *In the Matter of the Application of QualStar Communications, Inc. for Authority to Provide Local Exchange Service in Ohio*, PUCO Case No. 00-612-TP-ACE, Finding and Order (August 24, 2000) (available at <http://dis.puc.state.oh.us/CMPDFs/GXZJXW63G23LVK9@.pdf>).

¹⁴ See *In the Matter of the Application of EZ Phone Inc. for a Certificate of Public Convenience and Necessity to Provide Resold Local Exchange Services Throughout the State of Ohio*, PUCO Case No. 01-2632-TP-ACE, Finding and Order (November 7, 2002) (available at <http://dis.puc.state.oh.us/CMPDFs/LOSPRG86ZAJRCR1Q.pdf>).

years after the request was filed.¹⁵ The residential customers of the Lebanon exchange should not have to wait another two years before a potentially viable competitor can enter the market, especially in light of the unlawful and premature pricing flexibility for non-basic services that the PUCO granted Sprint 18 months ago.¹⁶ Only real competition can help rein in Sprint's ability to extract monopoly profits from residential customers in the Lebanon exchange.¹⁷ Grant of the Petition is a necessary step for making competition a reality for Lebanon's residential customers.

The residential customers of the Lebanon exchange have waited long enough to reap the benefit of local competition that was the cornerstone of the Act. Fulfillment of the commitments in the 1999 merger case should not be delayed any longer. The Commission should expeditiously grant the Petition.¹⁸

¹⁵ See *In the Matter of SBC Telecom, Inc. Petition for Modification of Certain LATA Boundaries in Ohio*, File No. NSD-L-00-25 (released December 16, 2003) (that petition was filed on September 6, 2001).

¹⁶ *In the Matter of the Application of United Telephone Company of Ohio dba Sprint for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, PUCO Case No. 02-2117-TP-ALT, Finding and Order (October 3, 2002) (available at <http://dis.puc.state.oh.us/CMPDFs/D5SW5IYWQYKQ4Y@K.pdf>). The PUCO's grant of pricing flexibility was based on an erroneous finding that basic service for all customers of all Ohio ILECs, including Sprint, was "subject to competition" or that all customers had "reasonably available alternatives," *id.* at 15, a conclusion that was not supported by the record in that proceeding. The OCC has appealed the PUCO's decision to the Ohio Supreme Court.

¹⁷ SBC Telecom plans to provide competition in Lebanon initially via resale (Petition at 3), which is generally a financially unviable means of serving residential customers. The OCC hopes that SBC Telecom's plans to transition to a facilities-based service (*id.*) will occur quickly and will exist longer than the two years required by the merger commitment.

¹⁸ As noted here, the OCC support's SBC Telecom's petition as it will increase competition in Sprint territory. In the broader context, however, SBC Telecom's petition pales in significance compared to the efforts of SBC Communications and SBC Ohio, Inc. – the Company's Ohio ILEC affiliate – to choke off competition in SBC Ohio's territory by seeking unreasonable increases in prices for the unbundled network elements platform, the primary means that CLECs use to compete in the residential market. For a discussion of those efforts, see *In the Matter of the Application of SBC Ohio for Review of TELRIC Costs for Unbundled Network Elements*, Memorandum Contra of the Office of the Ohio Consumers' Counsel to SBC Ohio's Motion for Interim Prices and Expedited Consideration, PUCO Case No. 02-1280-TP-UNC (March 10, 2004) (available at [http://dis.puc.state.oh.us/CMPDFs/T\\$EKD8MSI8L1OF.pdf](http://dis.puc.state.oh.us/CMPDFs/T$EKD8MSI8L1OF.pdf)).

Respectfully submitted,

Eric B. Stephens
Deputy Consumers' Counsel

/S/ Terry L. Etter
Terry L. Etter
David C. Bergmann
Assistant Consumers' Counsel

OHIO CONSUMERS' COUNSEL
10 West Broad Street, 18th Floor
Columbus, Ohio 43215-3485
(614) 466-8574

March 17, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of these Comments of the Office of the Ohio Consumers' Counsel was served on this 17th day of March 2004 by first-class mail, postage prepaid, to counsel for Petitioner, SBC Telecom, Inc., at the following address:

Steven D. Strickland
SBC Telecom
1010 N. St. Mary's
San Antonio, TX 78215

/S/ Terry L. Etter
Terry L. Etter
Assistant Consumers' Counsel